

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-7103

77-7115

United States Court of Appeals

For the Second Circuit

CANDACE VAN ALEN,

Plaintiff-Appellant-Appellee,

—against—

DOMINICK & DOMINICK, INCORPORATED and
PAUL deGIVE,

Defendants-Appellees-Appellants.

On Appeal from the United States District Court,
Southern District of New York

BRIEF FOR PLAINTIFF-APPELLANT-APPELLEE

CHARLES NORMAN SHAFFER
Attorney for Plaintiff-Appellant-Appellee

Shaffer and Davis
16 South Adams Street
Rockville, Maryland 20850

Of Counsel:

JEROME KAMERMAN
PHILIP A. GREENBERG
DAVID S. ZEIDMAN

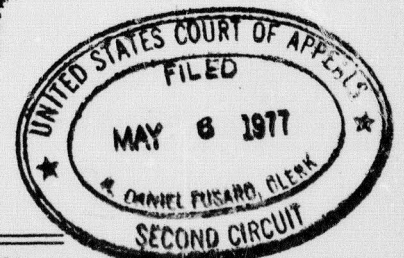


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BRIEF OF PLAINTIFF-APPELLANT-APPELLEE

PRELIMINARY STATEMENT

Plaintiff, Candace Van Alen ("Van Alen") appeals from a judgment (A-829) entered in the Southern District of New York dismissing the remaining four causes of action in the Complaint against the defendants Dominick & Dominick, Incorporated ("Dominick") and Paul deGive ("deGive"). Van Alen also appeals from the decision granting defendants' motion to dismiss the Fifth Cause of Action and denying plaintiff's motion for summary judgment (A-61).

Simultaneously with plaintiff's appeal, defendants have appealed the Court's denial of their motion for reasonable attorneys' fees in this action (A-831).

THE ISSUES PRESENTED ON APPEAL

1. Did the trial court make a reversible error when it refused to allow plaintiff to examine defendant deGive on several "diary entries"?
2. Did the trial court err when it granted defendants' cross-motion to dismiss Count V?
3. Was the trial court's decision in error as based upon clearly erroneous findings of fact?

STATEMENT OF THE CASE

(a) Prior Proceedings:

Plaintiff commenced this action under the Securities and Exchange Act of 1934 and Rule 10(b)-5 promulgated thereunder. She asserted three claims for relief, Count I, III and IV, in which it is stated that Dominick and deGive churned her securities trading accounts held at Dominick, Bank of New York and First National City Bank by engaging in a pattern of excessive trading for the purpose of obtaining additional commissions from her accounts during the period February 11, 1969 through April 3, 1970. In Count II, plaintiff alleged a common law claim for relief, sounding in fraud, based upon misrepresentations that deGive had a system to obtain profits through buying and selling securities and that the system would be applied to plaintiff's accounts during the complained of period; in addition, defendants had represented that they would operate plaintiff's accounts in accordance with the rules of the New York Stock Exchange (A-47). In Count V, plaintiff alleged that she was entitled to damages because defendants did not comply with the supervisory rules of the NYSE.

Defendants interposed their answer denying all liability (A-53). The trial court dismissed Count V as a

result of defendants' cross-motion for dismissal prior to the trial (A-56). After the trial, the Court dismissed the remainder of plaintiff's claims based upon its Findings of Fact and Conclusions of Law contained in the trial court's Opinion (A-772).

(b) The Facts:

In 1953, plaintiff entrusted deGive, a registered representative who since 1949 has been employed by Dominick, which is a member firm of the NYSE, with discretionary control over an account she then opened at Dominick. Similarly, deGive was vested with discretionary power over plaintiff's accounts at the Empire Trust Company (later known as The Bank of New York), and later at First National City Bank. All trades emanating from those accounts went through Dominick. In 1963, at deGive's suggestion, plaintiff authorized the transformation of her account at Dominick to a margin account.

At the time plaintiff turned control over her accounts in 1953, it was understood that funds in those accounts were all plaintiff had and she wanted deGive to "nurture the account and make it grow" (A-334). deGive understood that although plaintiff's husband was a beneficiary of trusts held for his interest, plaintiff would receive no benefit from the trusts

upon her husband's death (A-335). It was further understood by deGive that he was to treat the accounts as if they belonged to a member of his own family (A-775). Plaintiff testified that she told deGive that he should "look after it and hopefully build it up, protect it so it did not shrink in (her) old age, because it was the only money (she) had". deGive denied that plaintiff referred to her old age (A-161,334).

Plaintiff stated that she turned over full control to deGive because among other reasons "she did not know anything about the stock market and because she traveled away from home many months of each year."

Upon opening the Dominick account, an account card was prepared and signed under deGive's supervision and control. The account card failed to indicate that plaintiff's account was a discretionary account (A-340-345). The parties all understood that the account would be run in accordance with the applicable rules and regulations of the NYSE(A-348).

deGive supposedly managed the plaintiff's accounts through the use of his "Technical System" which he used in an attempt to predict the movements of the stock market, prior to 1969. deGive charted market movements on graphs based upon 7, 10, 12, 18 and 30 day moving averages. Also, deGive used a 60 day moving average which

was computed by Lowry's Services, Inc. (A-318-323). Plaintiff was told that deGive had a system which he believed to be successful and she was also told that he was going to apply his system to her accounts (A-296-98).

In the years 1953 through 1968, deGive at times made substantial gains for plaintiff's accounts and at times incurred substantial losses. However, plaintiff never complained until the period February 11, 1969 through April 3, 1970 (A-47).

As of February 1, 1969, plaintiff's investments were valued at \$1,600,021.41 (A-891a). Between February 1969 and April 1970, deGive made 285 transactions in plaintiff's accounts, incurring net losses of \$599,046.00 in these 285 trades (A-842,891a). From this trading activity, Dominick received a commission of \$73,480.75, of which deGive retained one-third(A-849).

During the period complained of, there was a pronounced change in the frequency and size of trades deGive made in plaintiff's accounts. Basically, during 1969 and 1970, deGive purchased and sold for plaintiff's accounts, committing her entire capital in a very short interval of time and by selling all her holdings within a short time thereafter.(A-842).

From February 11-14, 1969, deGive purchased 27 separate stocks valued at \$700,889. Approximately one week later, he sold out all those stocks. Beginning April 30 to May 5, 1969, deGive purchased

40 stocks valued at \$1,347,146 for plaintiff's accounts and sold out entirely one month later. Once again, October 14, 15, 28 and 29, 1969, deGive purchased 58 stocks valued at \$1,467,507 and sold all of them between January 28-29, 1970. Finally, deGive purchased 29 stocks valued at \$480,874 on March 2-3, 1970. Whereupon, on April 3, 1970, plaintiff revoked deGive's trading authority over her accounts. The 1969-70 pattern of trading is in direct contrast to the slow, continual pattern used by deGive in prior years, wherein he invested in a small number of stocks, week by week, and he did not commit plaintiff's entire holdings within a few days, as he did during the complained of period.

Another comparison of the two periods show an equally striking contrast in trading. During 1969, deGive engaged in 144 transactions (72 purchases and 72 sales) in three months or less. However, during the prior years, 1965-1968, there was a relatively insignificant number of short-term trades. During the entire period complained of, deGive entered into only one transaction in which he bought a stock for plaintiff's account and held it for longer than six months. In contrast, during the years 1965-1968, deGive engaged in a large amount of long-term trading for plaintiff's accounts (A-850).

This unusual pattern of trading was brought to the attention of one of plaintiff's counsel, Jerome Kamerman, Esq., and he thereupon undertook to make inquiries of Dominick in an effort to obtain a satisfactory explanation of trading in plaintiff's

accounts in 1969 and 1970 (A-1043-5), In June 1971, after fully advising Dominick and its representatives of his capacity and the nature of his inquiry, certain diary entries were presented to Mr. Kamerman by deGive with the claim that these were contemporaneous entries in his desk diary which proved that he met with plaintiff and notified her of his planned action before making any of the trades in her accounts during the complained of period (A-1051-2). Plaintiff's travel records, however, showed that the alleged meetings could not have taken place on the dates, places or times when deGive alleged that he had met with her and supposedly obtained her approval of his trading actions. After this action was commenced, deGive retracted his representations that the diary entries were a contemporaneous memoranda of meetings he had with plaintiff. deGive thereupon alleged that he had added these entries to previously used diary pages to refresh his memory for the meeting with Mr. Kamerman (A-1044,1051). The trial court excluded the diary entries and any examination of deGive based upon the diary entries without holding voir dire, relying solely upon Federal Evidentiary Rule 403 (A-672-3).

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE
ERROR WHEN IT REFUSED TO ALLOW PLAINTIFF
TO EXAMINE DEFENDANT PAUL deGIVE ON SEVERAL
"DIARY ENTRIES".

The trial judge in the case at bar erroneously refused to allow plaintiff to examine defendant deGive on several "diary entries" which deGive had shown to Jerome Kamerman, Esq., one of the attorneys for plaintiff, in June 1971.

The admissibility of "diary entries" and the testimony which would have related thereto was central to the ultimate issue at the trial, i.e., whether defendant deGive churned plaintiff's discretionary securities accounts. In fact, at page 781 of the trial transcript (A-558), the judge stated, in referring to the "diary entries", that "in some respects this is perhaps the most serious evidentiary question which has been raised since the trial began".

Plaintiff, in examining defendant deGive, wanted to question Mr. deGive on the "diary entries". These diary entries had initially been shown to Mr. Kamerman in June 1971, in an attempt by Mr. deGive to convince Mr. Kamerman that he had consulted with plaintiff before making substantial transactions for her securities accounts. However, upon further investigation, Mr. Kamerman discovered that the purported diary entries were a fraud, in that plaintiff had never been present at the meetings which were supposedly evidenced by the diary

entries. After the herein litigation began, Mr. deGive admitted that the diary entries had not been made at the time of the supposed meetings, but rather two years later.

The supposed diary entries had been proffered by plaintiff on three theories:

- (1) false exculpatory statements;
- (2) conduct inconsistent with deGive's claim that he did not handle plaintiff's account in a fraudulent manner;
- (3) defendant deGive's consciousness of his own fraud.

Plaintiff respectfully points out to this Court that in his decision, the trial judge noted at several places that the key issues to be resolved were whether plaintiff or defendant deGive was telling the truth. As both sides in this litigation will readily concede, the central issue in this case is whether or not defendant deGive made the trades for plaintiff's account to generate commissions or whether he made the trades with plaintiff's best interests in mind. Unquestionably, if plaintiff can prove that defendant deGive attempted to make it seem that the transactions were initiated by plaintiff, and not by him, such an attempt strongly suggests that Mr. deGive realized that the transactions were improper. Moreover, his desperate ruse to avoid responsibility for his actions greatly undermines the credibility of his entire testimony.

The plaintiff submits that the trial judge's decision

to exclude the evidence relating to the false diary entries was wrong as a matter of law. Since the trial judge did not make it completely clear why he was excluding this evidence, plaintiff must assume that the judge adopted the arguments of defendants, i.e., that the "diary entries" were inadmissible because the evidence relating thereto had been improperly obtained by Mr. Kamerman. If that is the case, the judge's ruling was incorrect on two grounds: Mr. Kamerman had not obtained the evidence improperly; even if Mr. Kamerman had obtained the evidence improperly, the evidence was still admissible. In addition, plaintiff submits that under any theory, the evidence relating to the supposed diary entries should not have been excluded pursuant to Rule 403.

A. The evidence relating to the "diary entries" was not obtained improperly

The exhibits which were presented to the court, if correctly interpreted, show that the evidence relating to the alleged diary entries was not improperly obtained.

Defendants based their entire argument on a letter dated March 25, 1971, on the letterhead of Kamerman & Kamerman, Certified Public Accountants. Defendants argued that Mr. Kamerman, by the use of the CPA letterhead, tricked defendant deGiv into thinking that he was meeting with Mr. Kamerman pursuant to an audit for plaintiff, rather than preliminary to this litigation. However, one of the

fallacies in defendants' argument is contained in the letter itself; the letter was signed by Joseph Labenson, CPA, and not by Mr. Kamerman; moreover, the letter did not request that Mr. deGive meet with Mr. Kamerman, or anyone for that matter, but rather asked him to send a list of assets which he held for plaintiff, as of December 31, 1970.

The exhibits submitted by plaintiff to bolster its argument for admissibility of the diary entries, prove conclusively that Mr. deGive could not, and was not, misled.

Firstly, on October 21, 1970, over five months before Mr. deGive received the letter from Mr. Labenson, Mr. Kamerman met with Thomas F. Carey, Assistant Compliance Director of defendant, Dominick. At that meeting, Mr. Kamerman told Mr. Carey that he had been retained, as attorney, by plaintiff and her husband, with respect to various problems in their account at Dominick; among the problems raised by Mr. Kamerman at that time, was that, beginning with 1969, Mr. deGive had radically changed the trading philosophy which he used in the accounts of plaintiff and her husband from the philosophy which he had applied before 1969 (A-1050).

On November 3, 1970, Mr. Carey responded to Mr. Kamerman's inquiries with a letter to Mr. Kamerman, but he failed to explain the change in trading philosophy. The next day, Mr. Kamerman called Mr. Carey and was told that Mr. deGive would explain the trading philosophy himself to Mr. Kamerman.

On December 28, 1970, Mr. deGive called Mr. Kamerman and attempted to explain his trading philosophy. However, Mr. Kamerman was unsatisfied with the explanation and called Mr. Carey to tell him so.

In February 1971, over one month before Mr. Labenson's letter was sent, Mr. Kamerman sent a letter, on legal stationery, to Mr. Carey about plaintiff's trading account (A-1041). Shortly after that letter was sent, Mr. Carey or one of the other Compliance Directors at Dominick, Mr. Albano, told Mr. Kamerman that Mr. deGive had diary entries which would show that plaintiff and her husband knew of and approved the change in trading philosophy, and that Mr. deGive would show the diary entries to Mr. Kamerman.

On June 21, 1971, Mr. Kamerman received a telephone call from a Dominick employee telling him that Mr. deGive would call and bring the diary entries to Mr. Kamerman.

Finally, on June 30, 1971, defendant deGive called Mr. Kamerman, came to his office, and read to him the diary entries which had been reproduced in plaintiff's Exhibit 12 (A-856-67), and which supposedly showed that plaintiff had approved all of the major transactions for her account.

The aforementioned letter on legal stationery, February 19, 1971, was submitted to the trial judge as Exhibit 3

(A-1041). Exhibit 3 is a carbon copy of that letter, on blank stationery. It is assumed that defendants have the original of that letter, on legal stationery; defendants have never denied that the February 19th letter was on legal stationery.

Plaintiff submits that the Court should also consider the fact that Mr. deGive was a high ranking officer at Dominick and, of course, was directly concerned with the complaints of Mr. Kamerman and plaintiff, about the handling of plaintiff's account. It is virtually impossible for Mr. deGive to have been unaware that Mr. Kamerman, acting as plaintiff's attorney, had raised several questions about the handling of plaintiff's account, well before Mr. deGive received the letter from Mr. Labenson of March 25, 1971.

Plaintiff then requested that a voir dire be held, if the trial judge felt that the exhibits and written statements were insufficient to make a decision. Defendants, knowing how untenable their position was, opposed the voir dire.

Therefore, the evidence and Memorandum of Law submitted to the trial judge prove that the evidence relating to the diary entries was not obtained improperly. In any event, it was clearly error for the trial judge not to hold a voir dire, from which he would have become satisfied that the evidence was admissible.

B. Even if Mr. Kamerman had obtained the evidence improperly, the evidence was still admissible.

It is settled law in New York, and in other jurisdictions, that the manner in which evidence is obtained does not affect the admissibility of the evidence in a civil case. As was noted at 21 NY. Jur. Evidence, Sec. 170:

"In New York, with the exception of evidence unlawfully obtained by tapping telephone wires, it seems to be established that the fact that evidence has been illegally obtained does not affect admissibility in a civil case, or as has been said, relevant evidence, even if illegally obtained, is admissible and competent".

For example, in the case of Sackler v. Sackler, 16 A.D. 2d 423, 229 NYS 2d 61 (2nd Dept., 1962), the Appellate Division held admissible evidence which was obtained by plaintiff therein and "other members of a raiding party" who broke into the defendant's apartment without her consent and without a search warrant, and obtained the evidence which plaintiff therein used to successfully prove adultery. In fact, the Sackler court cited the case of Bloodgood v. Lynch, 293 N.Y. 308 (1944) and stated that the rule in New York was that "evidence illegally obtained is admissible and competent in a civil action". 16 A.D. 2d at 427.

Federal cases, both in the Southern District of New

York, and in other federal district courts, have agreed that evidence, even if improperly or illegally obtained, is still admissible.

See, e.g., Meister v. Commissioner of Internal Revenue, 504 F. 2d 505 (3rd Cir. 1974); Knoll Associates, Inc. v. Dixon, 232 F. Supp. 283 (SDNY, 1964); U.S. v. One 1953 Oldsmobile Sedan, 132 F. Supp. 14 (W.D. Ark., 1955); Lindeman v. Textron, Incorporated, 143 F. Supp. 955 (SDNY, 1956).

In sum, while plaintiff insists that the evidence at issue was not obtained improperly, the evidence is still admissible even if the Court finds that Mr. Kamerman acted improperly. It is settled law that in a civil case evidence will not be excluded, even when the evidence was obtained under questionable circumstances. The proffered evidence relating to the diary entries should have been admitted by the trial judge herein.

C. The evidence relating to the "diary entries" was not excludable under any other theory.

As noted earlier, the trial court herein rejected the evidence relating to the diary entries under Rule 403. Since the trial judge did not set forth his reasons for rejecting the evidence, plaintiff assumed, in the above two sub-points, that the judge adopted the argument set forth in the Memorandum of Law submitted by defendants at the trial. Plaintiff realizes that defendants may now argue that the evidence was excludable under another theory under Rule 403,

(especially since Rule 403 does not appear to give a trial judge the right to exclude evidence because it was supposedly obtained improperly).

Rule 403 of the Federal Rules of Evidence reads as follows:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 403 went into effect in 1975, and consequently, there is little case law interpreting this rule. The notes of the Advisory Committee on Proposed Rules are instructive. These notes stated in part that in applying Rule 403, what is called for is "balancing the probative value of a need for the evidence against the harm likely to result from its admission." Plaintiff will show that the proffered evidence herein had great probative value and there was no harm which would have resulted from admitting the evidence.

As noted earlier in this point, Judge Pierce stated, in referring to the evidence at issue, it was "perhaps the most serious evidentiary question which has been raised since the trial began". As was also shown above, the evidence concerning the supposed diary entries relates to the central issue in this case; i.e., whether

defendant deGive intended, and did, churn plaintiff's securities accounts.

The last three criteria for excluding evidence under Rule 403 are "considerations of undue delay, waste of time, or needless presentation of cumulative evidence". None of these criteria could be used in this case. In the Memorandum of Law submitted to Judge Pierce (A-1056), plaintiff stated at page 7, that it anticipated that it would take no more than twenty minutes to present the evidence relating to the diary entries. Moreover, the evidence relating to the diary entries could hardly be said to be cumulative; plaintiff had introduced no similar evidence of deGive's attempt to camouflage his actions, nor did plaintiff introduce any other evidence which would have been so devastating to Mr. deGive's credibility.

As pointed out in 10 Moore's Federal Practice, Sec. 403.02

(3):

"Rule 403 compels the exclusion of relevant evidence when its probative value is substantially outweighed by the danger that its admission will cause 'unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" (Emphasis in original)

Plaintiff respectfully submits that the probative value, which was acknowledged by the trial judge, of the proffered evidence, was not outweighed, at all, by any of the criteria of Rule 403. The trial

judge's exclusion of the evidence was clearly an abuse of discretion.

Plaintiff has shown that under any theory the evidence relating to the fraudulent diary entries should have been admitted under Rule 403. The evidence was properly obtained and, even if the Court believed that it was not, it was admissible anyway. Moreover, the evidence at issue was of substantial probative force and was not excludable under any of the criteria contained in Rule 403. The exclusion of this evidence was reversible error.

POINT II

THE COURT BELOW ERRONEOUSLY GRANTED DEFENDANTS' CROSS-MOTION FOR DISMISSAL OF COUNT V

In its endorsement Order, the Court below dismissed plaintiff's Count V for failure to state a cause of action under the securities laws as not linked with a claimed fraudulent scheme. This was erroneous, for the Federal courts hold that an allegation of a violation of the rules of the New York Stock Exchange (NYSE) can in and of itself state a good cause of action under the securities laws without any allegation of fraud. In addition, plaintiff's Count V stated a valid complaint on agency and contract theories. Therefore, plaintiff should have been given the opportunity to prove her case in Court.

Plaintiff moved before trial in the Court below for summary judgment on Count V of the complaint. This Count alleges that in contravention of its contractual obligation, Dominick failed to comply with the supervisory rules of the NYSE, in particular rules 342, 405 and 408. Admissions in the record made by defendants were cited by plaintiff as proof that plaintiff's account at Dominick was not handled in accordance with the supervisory rules. Plaintiff argued that quite logically the losses in her account resulted from defendants' failure to follow the supervisory rules; moreover, under the applicable law, due to defendants' admissions, the burden had shifted to defendants to prove that damages had not resulted from the violations. Defendants'

submission in response to plaintiff's motion made little or not attempt to prove that the damages had not resulted from their failure to follow the rules. Accordingly, inasmuch as the allegations contained in Count V stated a good cause of action and were proven by defendants' admissions, Count V should not have been dismissed before trial.

Undisputed Material Facts

Plaintiff gave discretionary power over her account to deGive, and as a result he was able to purchase and sell securities in her account without consulting with her or obtaining her approval. NYSE rule 405 applies to all accounts handled by a brokerage house and rule 408 specifically applies to discretionary accounts. These rules provide the following protection for the customer:

(a) Rule 405 requires that the brokerage house supervise its employees and that an officer be designated to learn essential facts relating to the customer and to all transactions made in the customer's account.

(b) Rule 408 requires that each order in a discretionary account be approved and initialed on the day entered by an officer who has been given written authority; that each such order in the discretionary account be identified on the order slip as being made for a discretionary account; and that each such account receive frequent and appropriate supervisory review. Defendants conceded in their answering Memorandum in the lower Court that none of the hundreds of orders made in plaintiff's account was either approved or initialed

by any officer of Dominick (A-40). Defendants also conceded that none of the orders was identified as discretionary (A-911,914), and that plaintiff's account did not receive either frequent review or appropriate review, or in fact any review at all.

Defendants allege that with respect to rule 408, one of its officers scanned the "blotter" and the confirmations for the previous day's activity for all customers, in one sitting, and thereby conformed with the requirements of rule 408 (A-43). Plaintiff submits that a cursory review of all transactions made for all of Dominick's customers, on the day after they were executed and at a time when they were irreversible, does not comply with the requirement that all orders for a discretionary account be approved in advance.

Plaintiff also urges that the fact that deGive was not required to obtain prior approval for any of the trades for plaintiff's account allowed deGive to proceed with an irrational course of conduct. The essence of rules 405 and 408 is to have "two heads" on every account. In an ordinary case where there is no discretionary control, the customer will consult with his registered representative, thereby providing the necessary "two heads". In a discretionary account, the customer's presence is eliminated. Rule 408 was designed so that an officer of the brokerage firm acts as the second head by consulting with the broker, thereby preventing the broker from making irrational moves on an unsupervised basis, even where the broker is not acting fraudulently with scienter.

It is clear that defendants' failure to follow rules 405 and 408 was deliberate. Defendants admitted in their answers to interrogatories

that they received the NYSE Educational Circular (A-839) which emphasized and explained rule 408 and detailed its procedure (A-916). This deliberate failure gives rise to plaintiff's Count V and is supported by the following three legal theories:

A. Dominick is liable as a disobeying agent.

Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. 2 A C.J.S. Agency Sec. 4(a), Brilliant v. Raidy, 189 Misc. 561, 70 N.Y.S. 2d 126 (Mun. Ct., N.Y.C., 1947).

In the case at bar, the "Customer's Agreement" which is part of plaintiff's motion papers, stated in part that:

"You (Dominick & Dominick) are hereby constituted the brokers and agents of the undersigned for the purpose of consummating all transactions."

The agreement was signed by plaintiff and a representative of Dominick.

Therefore, an agency relationship was created by the plaintiff's consent to be principal and Dominick's consent to be agent for the purpose of executing stock transactions.

An agent is in a fiduciary relationship with his principal and owes a duty of loyalty and good faith. See, Lamdin v. Broadway Service Advertising Corp., 272 N.Y. 133, 138; 5 N.E. 2d 66 (1936).

The general rule in New York is that when an agent acts without authority or acts beyond the scope of authority, he becomes liable. See, Moore v. Maddock, 251 N.Y. 423, 425; 167 N.E. 573 (1929); Goldfinger v. Doherty, 153 Misc. 826, 276 N.Y.S. 289, 293 (App. Term, 1st Dept. 1934).

When an agent performs an authorized act in a manner other than as specifically directed, then the principal has an action for damages for breach of contract. See, Minneapolis Trust Co. v. Mather, 181 N.Y. 205, 213, 73 N.E. 987 (1905); Miller v. Dean Witter and Co., 64 Misc. 2d 105, 314 N.Y.S. 2d 380, 382 (Civ. Ct., Bx. Cty. 1970). As was stated in Minneapolis Trust Co. v. Mather, *supra*, at 214:

"It is undoubtedly the duty of an agent to obey all the lawful instructions of his principal, and the agent is clearly responsible for all losses occasioned by his disobedience thereof."

The general rule in other jurisdictions is the same as in New York. When an agent fails to perform his duties in accordance

with the directions of his principal, the agent becomes liable for the resulting loss. See, e.g., Manufacturers Cas. Ins. Co. v. Martin Lebreton Inc. A., 242 F. 2d 951, 953 (5th Cir. 1957); Falls Lumber Co. v. Herman, 181 N.E. 2d 713, 715 (Ohio 1961); See, 3 C.J.S., Agency, Sec. 288.

The Agent is held liable even when the directions violated appear to be immaterial. For example, an agent has been held liable when he sends money in a certain way or by a particular channel different from the mode chosen by his principal. Bell v. Chapin, 23 Tex. 411, 413 (1859). An agent who was directed to buy certain property at a certain place from men named was held liable for buying at another locality and from different people, even though the goods purchased were of equal quality and value. Robinson v. Thompson, 74 Misc. 847, 852 (1897). As was stated in Wilson v. Wilson, 26 Pa. 393 (1856) at page 394:

"It is not sufficient that the deviation was not material if it appears that the party giving the instruction regarded them as material, unless it be shown affirmatively that the deviation in no manner contributed to the loss."

After it is shown that an agent has violated the instructions of his principal, the agent must overcome a heavy burden to escape liability. The United States Supreme Court, in Bank of

British North America v. Cooper, 137 U.S. 473 (1890) set down the following rule:

"If positive instructions are disobeyed and loss results, prima facie liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result."

In Adams v. Robinson, 65 Ala. 586, 591 (1880), the court held that after an agent is shown to have disobeyed his instructions, "every doubtful circumstance would be construed unfavorably to the rights and interests of the agent perpetrating the wrong." Furthermore, a failure by the principal to prove either negligence or lack of diligence by the disobeying agent will not lessen the agent's burden. Benton v. Roberts, 41 Ga. App. 189, 190 (1920).

In the case at bar, the Customer's Agreement which created the agency relationship contained the following provision:

"All transactions shall be subject to the rules, regulations, customs and usage of the exchange or market (and its clearing house, if any) where executed, and to the provisions of the Securities Exchange Act and the rules and regulations of the Federal Securities and Exchange Commission and of the Federal Reserve Board insofar as they may be applicable."

This requirement constituted an explicit instruction that all transactions executed pursuant to the agency agreement be made in accordance with the rules of the stock exchange where executed. Since all the

transactions were made on the New York Stock Exchange, Dominick, as plaintiff's agent, had to abide by the NYSE rules when making securities transactions. As proven by defendants' answering memorandum and their answers to interrogatories, it is not disputed that Dominick violated many of the NYSE rules in its handling of plaintiff's account.

Plaintiff has proven that explicit instructions were breached and that losses were suffered. Under the applicable case law, the burden of proving that the damages were not caused by the breach is upon the defendant. Defendants did not even attempt, in their answering papers, to overcome this burden.

The fact that plaintiff received notification after each transaction was completed does not change the result. For, plaintiff's failure to object under these circumstances did not constitute ratification.

Under New York law, the elements necessary for ratification were not present. Firstly, in order to have ratification of an unauthorized act of an agent, the principal must have expressly or impliedly intended to ratify. Merriitt v. Bissell, 155 N.Y. 396 400 (1898). In the case at bar, there is no indication that plaintiff ever intended to ratify defendants' unauthorized act.

Another essential element of ratification is knowledge of the material facts and circumstances by the principal. See,

Corrigan v. Bobbs-Merrill Co., 228 N.Y. 58, 70 (1920); First Nat. Bank of Morrisville v. Starke Design, Inc., 11 A.D. 2d 595, 200 N.Y.S. 2d 708, 710 (3rd Dept. 1960). In the case at bar, since plaintiff was not notified of the manner in which the orders were executed, she could not have known that defendants were acting outside their scope of authority.

As was said in the case of King v. MacKellur, 109 N.Y. 215 (1888) at 223:

"Ratification implies a knowledge of the circumstances and of the right to reject or ratify."

In the King case, the plaintiff did not have knowledge until after exposure to defendant agent's conduct. The court did not attach importance to plaintiff's acceptance of the deed purchased outside the agent's scope of authority because the principal took the deed in ignorance of the circumstances. In the case at bar, plaintiff's failure to object to the completed transactions did not constitute ratification since, as in King, plaintiff did not know of the breach of authority at the time that she received notification from her agent.

In conclusion, it is undisputed that defendant failed to follow the rules of the NYSE. This failure constituted a violation of explicit instructions contained in the "Customer's Agreement". Therefore, Dominick is liable as a disobeying agent.

Judge Pierce in his opinion supporting his decision to dismiss Count V, quoted out of context from plaintiff's Memorandum of Law supporting her motion for summary judgment; Judge Pierce concluded that Count V, to the extent that it was based on the theory of agency and contracts, was insupportable because plaintiff could not prove causation. Actually, plaintiff is certain that she can prove that the damages were caused by the rules' violations. In fact, plaintiff called an expert witness at the trial, who did testify that in his opinion, the losses were caused by the failure to follow the supervisory rules.

Plaintiff respectfully submits that Judge Pierce's conclusion that the losses could not have flowed from the rules' violations is illogical. The nature of NYSE Rules 342,405 and especially 408, show that they are designed to prevent the kind of losses sustained by plaintiff herein.

Rule 408, in substance, requires a broker, who is exercising discretionary authority over a customer's account, to obtain the approval of an officer before he executes each transaction for such discretionary account. Obviously, Rule 408 is based on the proverbial notion that "two heads are better than one". The admitted deliberate failure by defendants to comply with this rule allowed

defendant deGive to engage in irrational trading activities in his handling of plaintiff's account. Plaintiff submits that her damages were caused by defendants' failure to follow Rule 408.

Moreover, as was shown under the above discussion covering agency, and as will be shown under the other two theories to be discussed in "IIB" and "IIC" infra, the burden of proving that the damages were not caused by the rules violations should have been shifted to defendants, since it is undisputed that the rules were violated. But, even if the burden of proof did not shift, plaintiff submits that under any reading of the applicable law, plaintiff was entitled to prove that her damages were caused by Dominick's failure to follow the NYSE rules.

In sum, Judge Pierce was in error when he determined that plaintiff could not even try to show that her losses were caused by defendants' failure to follow the NYSE rules. Count V should have been dismissed.

B. Dominick breached its contract with plaintiff.

In the case at bar, the "Customer's Agreement" was a contract between plaintiff and Dominick. As was discussed under "A" above, under the terms of the contract, Dominick promised to abide by the rules of the stock exchange where the transactions were executed. Since all of the transactions were made on the New York Stock Exchange, Dominick was bound to follow the NYSE rules when handling plaintiff's account.

In the case at bar, Dominick violated many of the NYSE rules in its handling of plaintiff's account. As shown earlier in Point IIA, Dominick has admitted that it violated the rules. Since under the "Customer's Agreement", Dominick was bound to follow the NYSE rules, Dominick's failure to abide by the rules constituted a breach of the contract. Therefore, Count V is a viable cause of action on the theory of breach of contract.

Since there is no dispute as to the question of a breach, the main problem is measure of damages. Plaintiff concedes that it is difficult to determine, precisely, to what extent losses would have been avoided had Dominick obeyed the NYSE rules. However, as stated in Williston on Contracts, Sec. 1346:

"Though the fact that the plaintiff's damage is uncertain in amount or even that it is uncertain that substantial damage has been caused should not deprive the plaintiff of a right to compensation for the loss of the defendant's performance which would have given the plaintiff a chance to make profit or avoid damage . . . Where a breach of contract involves deprivation of a chance which has value in a business sense, a just reluctance will be felt by most courts to deny altogether the recovery of substantial damages."

The New York courts have held that a wrongdoer may not escape liability solely because the ordinary standards for proving damages are not

available. See, MacGregor v. Watts, 254 App. Div. 904, 5 N.Y.S. 2d 525, 526 (2d Dept. 1938). New York Courts will award damages for breach of contract even though the amount of the damages is uncertain. Wakeman v. Wheeler & Wilson Mfg. Co., 101 N.Y. 205, 209, 4 N.E. 264, 55 Am. Rep. 676 (1886); Green v. Pure Oil Co., 285 N.Y.S. 432 (2d Dept. 1936); Turner v. American Metal Co., 36 N.Y.S. 2d 356, 387 (S. Ct., N.Y. Cty. 1942).

Any uncertainty in measuring damages is resolved against the defendant who breached the contract. Spitz v. Lesser, 302 N.Y. 490, 494, 9 N.E. 2d 540 (1951). Therefore, plaintiff's recovery must not be barred because her damages cannot arguably be traced with mathematical certainty to the breach of the contract. (The Court should note, however, that plaintiff's trial exhibits do prove her damages with mathematical certainty).

Dominick cannot defend on the ground that plaintiff waived the breach. Plaintiff's failure to object even though she was notified of each transaction did not constitute a waiver. For, a plaintiff waives a provision of a contract only if he has knowledge of a breach and accepts the benefits of the contract without objection.

See, New York Tel. Co. v. Jamestown Tel. Corp., 282 N.Y. 365, 372, 26 N.E. 2d 295, 297-8 (1940). Defendants have never disputed that plaintiff did not know that Dominick was not following the NYSE rules in its handling of plaintiff's account. Without that knowledge, plaintiff could not have waived her rights under the contract.

As noted under "IIA" above, Judge Pierce decided that plaintiff could not prove causation, under her agency and contracts theories. Plaintiff showed under "IIA", that in fact her damages did flow from the rules' violations, and that in any event, she is entitled to try to prove that her damages were caused by these violations.

C. Dominick's violation of the NYSE Rules makes it liable to plaintiff under the Securities Exchange Act of 1934.

As discussed under "A" and "B" above, it is undisputed that Dominick failed to abide by the NYSE rules in its handling of plaintiff's account. Plaintiff will show that Dominick's failure to follow, in particular, rules 405 and 408 of the NYSE, constitutes violations of the Securities Exchange Act of 1934 and the rules and regulations thereunder.

Judge Friendly, writing for the court in Colonial Realty Corporation v. Bache & Co., 358 F. 2d 178 (2d Cir., 1966), cert. den. 385 U.S. 817, 87 S. Ct. 40, 17 L. Ed. 2d 56, said at page 182:

"What emerges is that whether the courts are to imply federal civil liability for violation of exchange or dealer association rules by a member, cannot be determined on the simplistic all-or-nothing basis urged by the two parties; rather, the court must look to the nature of the particular rule and its place in the regulatory scheme, with the party urging the implication of a federal liability carrying a considerably heavier burden of persuasion than when the violation is of the statute or an SEC regulation. The case for implication would be stronger when the rule imposes an explicit duty unknown to the common law."

In Wolfson & Russo, The Stock Exchange Member:

Liability for Violation of Stock Exchange Rules, 58 Calif. L. Rev.

1120 (1970), written by two Securities & Exchange Commission attorneys, and in Note, Private Action As a Remedy For Violation of Stock Exchange Rules, 83 Harv. L. Rev. 825 (1970), the writers argue that a violation of those Stock Exchange rules which are designed to protect investors should give rise to a private right of action under the Securities Exchange Act of 1934.

The Securities & Exchange Commission (SEC) writing in an amicus curiae brief in the case of DeRenzis v. Levy, 297 F. Supp. 998 (SDNY, 1969), stated as follows at pages 9 and 10 of its brief:

"Private enforcement based upon violation of some stock exchange rules is necessary 'to make effective the Congressional purpose' and to provide a 'necessary supplement' to the exchange and the Commission action. In the absence of such remedies, the Commission might be required to promulgate rules of its own covering areas already covered by exchange rules. Likewise, public investors would not be adequately protected. Denial of such remedies based upon a formalized distinction between the exchange rules and those of the Commission would be inconsistent with the statutory purpose." See 58 Calif. L. Rev., supra, at 1132-3.

Therefore, there is authority for holding that the violations of some stock exchange rules do give rise to private right of action under the Securities Exchange Act and the regulations thereunder. Plaintiff submits that the NYSE rules disobeyed by Dominick are rules that when violated should give rise to liability under the federal act.

Using Colonial Realty Corporation v. Bache & Co., supra, as a springboard, the court in Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 410 F. 2d 135 (7th Cir., 1969) held that the violation of some NYSE rules gives rise to an action under the Securities Act. In fact, the Buttrey case involved a violation of NYSE rule 405, which is one of the rules that Dominick failed to follow. The Buttrey court held that ". . . one of the functions of

rule 405 is to protect the public, so that permitting a private action for its violation is entirely consistent with the purposes of the statute."

The case of SEC v. First Securities Co. of Chicago, 463 F. 2d 981, 988 (7th Cir.) cert. den. sub. nom. McKay v. Hochfelder, 409 U.S. 880, 93 S. Ct. 85, 34 L. Ed. 2d 134 (1972) involved a violation of rule 27 of the Rules of Fair Practice of the National Association of Securities Dealers, Inc. (NASD). Rule 27 is similar to NYSE rules 405 and 408 in that rule 27 requires NASD members to properly supervise the activities of their employees in connection with the solicitation or execution of any securities transactions. The court held that rule 27 provided a basis for a private damages action since the rule served to protect the public.

In Reynolds & Co., et al.,³⁹ SEC 902 (1960), the SEC held that a brokerage house was liable under the Stock Exchange Act and the rules thereunder because the brokerage house, among other things, failed to heed a rule of the NYSE which required that "all orders for discretionary accounts must be initialed and approved by a partner". The Commission recognized that this rule is now NYSE rule 408. The Commission, in Reynolds, supra, suspended the defendant brokerage house from NASD for its failure to adequately supervise employees. Such failure included violation of NYSE rule 408.

In 83 Harv. L. Rev., supra, at 836, the Law Review commentator specifically cited the NYSE rule 408 requirement to obtain approval of senior or approved personnel for discretionary trading

and the NYSE rule 405 requirement of having members familiarize themselves with a customer's needs, as examples of NYSE rules designed for investor's protection and therefore rules which should give rise to private actions when violated.

Applying Judge Friendly's criterion in Colonial Realty Corporation v. Bache & Co., supra, i.e., that the court must look to the rule's "place in the regulatory scheme" and see whether "the rule imposes an explicit duty unknown to the common law", it can be seen that rules 405 and 408 meet Judge Friendly's test. As plaintiff has shown, both rules were designed to protect investors; accordingly, the rules were the NYSE's attempt to carry out the purpose of the Securities Exchange Act of 1934 and the rules and regulations thereunder. Therefore, rules 405 and 408 have a definite place in the regulatory scheme. What is more, both rules set down specific duties of members of the Stock Exchange. These duties arose out of the securities statute and not out of a common law duty. Hence, Judge Friendly's second criterion is met. Rules 405 and 408, designed to protect investors like the plaintiff, give rise to a private right of action.

Once it is shown that a defendant has violated the Securities Act, a regulation promulgated thereunder or a Stock Exchange rule designed to further the purposes of the Act, such a

party cannot defend on the grounds of proximate cause. After the court in Buttrey v. Merrill, Lynch, Pierce, Fenner & Smith, supra, found that the defendant had violated NYSE rule 405, the court said at 410 F. 2d 143:

"To allow brokers to escape liability under such circumstances by blaming the . . . losses on a market drop would offend public policy and the aims and purposes of the securities law and the rules and regulations. We are unable to sustain the proximate cause defense as to any of the counts involved in this appeal."

Nor can Dominick defend on the ground that plaintiff ratified the transactions for her account by not objecting when she received confirmation of the orders executed for her account. It is recognized that the ordinary customer does not realize the effect of activity in his account and so does not waive his right to sue because he was notified that the transactions were made for his account. See, SEC Release No. 7743, at pages 31 and 33. A plaintiff can seek damages for all losses sustained prior to the time that plaintiff had knowledge of the violation of the Stock Exchange Act. See, Chasins v. Smith, Barney & Co., 438 F. 2d 1167, 1173 (2d Cir., 1970). In the case at bar, plaintiff did not have knowledge of violations of the Securities Act at any time during the period covered in the complaint.

In a recent decision, Starkman v. Seroussi, 377 F. Supp. 518, (SDNY 1974), U.S. District Judge Weinfeld held that the violation of rule 405 of the NYSE gives rise to a Federal cause of action under the Securities and Exchange Act.

In Starkman, the plaintiff sought to recover damages for violations of the 1933 and 1934 Federal Securities Laws. The defendants were Shearson, Hamill & Co. ("Shearson"), Henry Seroussi, its registered representative, and Seroussi's daughter. The action resulted from a purchase of 2,000 Leasco Corporation warrants in plaintiff's margin account maintained by Shearson and serviced by Seroussi. The Court stated that:

"Actions based upon alleged violations of an Exchange Rule governing its membership, which is designed to 'insure fair dealing to protect investors' as specified in Section 6(d) of the Exchange Act, may be equated to anti-trust litigation, where plaintiffs have been considered 'private Attorney Generals' to aid in the enforcement of the basic statute to protect the public investor."

The above language would allow a plaintiff to maintain an action as a private Attorney General where it is alleged that there exists a violation of a NYSE rule designed to insure fair dealing and protect investors. NYSE Rules 405 and 408 are definitely rules designed for that purpose. Plaintiff might be considered as such a private Attorney General seeking to protect her interests under the Securities and Exchange Act.

Judge Weinfeld stated that NYSE Rule 405 "has among its purposes protection of the customer qua customer", and that Rule 405 is an "integral part" of S.E.C. regulation and in furtherance of the purpose declared in Section 6(d) to "insure fair dealing and to protect investors". The Court, therefore, expressly recognized that a violation of Rule 405 may give rise to an implied Federal cause of action under the Securities Exchange Act of 1934. Contra, Landy v. F.D.I.C. 486 F. 2d 139 (3rd Cir. 1973) cert. denied, 94 S. Ct. 1979 (1974).

There can be little doubt that plaintiff has a right of action under the Stock Exchange Act and the rules and regulations thereunder because of Dominick's violation of NYSE Rules 405 and 408 in its handling of plaintiff's account.

It is undisputed that supervisory rules of the New York Stock Exchange were violated in the handling of plaintiff's account. In this brief, plaintiff has shown that under the applicable law, the undisputed violations by defendants are actionable and logically led to the losses in her account at Dominick. Moreover, the burden was on Dominick to show that her losses did not flow from the failure to follow the rules; however, defendants presented little evidence that the losses would have been incurred, even if they had

followed the rules. In any event, plaintiff was entitled to show that her damages did flow from the rules violations. Therefore, the lower court's decision should be reversed and plaintiff should be granted a trial on Count V of the Complaint.

In conclusion, the allegations contained in Count V are actionable under three different legal theories. Plaintiff has shown that the material allegations, i.e., defendants violated NYSE rules, are undisputed. Judge Pierce was in error when he dismissed Count V. Plaintiff is entitled to an opportunity to prove that she suffered losses as a direct result of defendants' violations of NYSE rules.

POINT III

NUMEROUS MATERIAL, CLEARLY ERRONEOUS
FINDINGS OF FACT RESULTED IN ERRONEOUS
CONCLUSIONS OF LAW WHICH REQUIRE A REVERSAL

The Court below attempted a nearly impossible task when it issued its opinion within a few weeks after the trial, without having available either the transcript or the parties analysis of the record. The trial itself ran from November 8th to November 16th and literally hundreds of exhibits were admitted into evidence. The trial Court refused plaintiff's offer to order the transcript, in order to tie in the testimony and exhibits in a post-trial brief. As appears in this point, the trial Court overlooked or misinterpreted the facts, and let itself be swallowed by the complexity of the evidence and the subtlety of the defense. However, a comparison of the record with the Court's findings shows them to be clearly erroneous in important and material respects and as a result, the Court's opinion should be reversed.

A. The Trial Court erroneously found that deGive used a chart "system" to time his purchases and sales for plaintiff's accounts, and that the "system" was uniformly followed during the period February, 1969 through March, 1970 and in all prior periods.

On each of four occasions, between February, 1969 and March, 1970, deGive invested plaintiff's entire account and then within a few days or weeks, sold them all, each time making the purchases and sales all at once. The striking feature of this activity is that all of the purchases were made within a day or two of each other

on each occasion. deGive called this making a "major move" (A-389-91). Plaintiff claimed that these transactions were excessive and made in bad faith only to earn commissions for defendants. In reply, deGive said that he made these purchases and sales in accordance with "signals" from his system, a system uniformly used by him for many years both to manage plaintiff's accounts and to write a market letter circulated to hundreds of defendants' customers.

The Court was faced with this issue: Did a system exist from which deGive got signals and did he uniformly follow those signals? The Court responded with the following findings of fact and conclusions of law:

"The evidence for the years prior to and including 1970 strongly supports the conclusion, and the Court specifically finds that the nature of deGive's system was such that in order to function as a basis for investment decisions, the system, as deGive understood it, indicated "major moves" in buying or selling when a certain number of indicators produced an appropriate signal."
(A-779)

* * *

"If there was a concurrence among a certain number of indicators that the market was moving up or down as a whole, deGive testified that he would derive a 'buy' or a 'sell' signal." (A-779)

* * *

"While neither party presented any expert testimony with respect to the wisdom or the efficacy of the system described at trial, it is clear that for many years the system was highly successful. There is no dispute that from the beginning of his handling of

the Van Alen account until the end of 1968, deGive acted in accordance with the signals given by his system," (A-780)

* * *

"There is no claim that during these years deGive failed to follow this system."
(A-785)

* * *

"Despite a valiant attempt by plaintiff's competent trial counsel, the evidence in the case just does not substantiate the claim that deGive's indicators constituted a 'paper system' which defendants employed as an 'umbrella' against the charge of churning." (A-802)

* * *

"Rather, the evidence is that each investment decision was made after consideration of the systems indicated," (A-803)

* * *

"This is not the usual churning case where the broker can offer no explanation or justification for his trading. . . rather than here the record contains a complete rationale for each investment move made by deGive."
(A-803)

* * *

"As noted above, the court has found that deGive had a strong good faith belief in the efficacy of his technical material."
(A-803)

These material findings on which the Court based its decision were all directly contradicted by the record and, therefore, are clearly erroneous.

The First Evidence That No System Existed

In order for a "system" to exist it must be definable. deGive defined his system by the signals given off from lines or

"oscillators" which he plotted on his charts. deGive testified that he kept seven charts for each year (A-443). The testimony showed, however, that deGive did not know how many signals he was looking for on those charts nor how to apply the signals in a coherent, uniform manner, as may be seen from the following testimony:

"Q . . . how many . . . indicators were there, if you know, approximately?

A. Ten all together for buying and selling, that is, for the market as a whole." (A-453-4)

As this answer did not tell how many of the ten were buy signals and how many were sell signals, deGive was asked to look at each of the seven charts for the year 1969 (A-478) and to call off the buying or selling indicator contained on each individual chart. He gave the following numbers:

Ex. 35 contains five indicators to buy and five to sell (A-514-517);

Ex. 36, three indicators to buy and three to sell (A-479);

Ex. 37, two indicators to buy and two to sell (A-479-80);

Ex. 38, one indicator to buy and two to sell (A-480-3);

Ex. 39, one indicator to buy and two to sell (A-484);

Ex. 40, one indicator to buy and two to sell (A-484-5);

Ex. 41, two indicators to buy and four to sell (A-485-6).

(It was stipulated that similar sets of charts were maintained in a parallel way for each year (A-443-4).

The number of indicators called off by Mr. deGive when he looked at each of the charts totaled fifteen to buy and twenty

to sell, making a total of thirty-five indicators. This actual total of thirty-five is more than three times the number which deGive claimed when asked how many indicators were contained in his system. It is simply inconceivable for deGive to have made such an error if he really had been operating his system uniformly for many years and relied on it in good faith, as found by the Court. One who was using a system on a daily basis for many years would never speak of ten indicators in a system that contained thirty-five and it is unreasonable for the trial Court to accept deGive's claim that he actually had a system. It appears from the record that the trial Court had not made notes with respect to the number of indicators and not having the transcript, did not notice the glaring discrepancy between deGive's answers. Nevertheless, this error and the Court's failure to observe it is a fundamental reason for the trial Court's erroneous conclusion that in fact deGive had a system on which he relied in good faith.

A comparison of deGive's pre-trial testimony regarding Ex. 35 with his trial testimony is indicative of his total inability to give the same story twice and his apparent disregard of the facts. Immediately after hearing him call off five buy and five sell indicators on Ex. 35, a portion of deGive's pre-trial testimony was read to him in which he had been asked how many indicators appear on this Ex. 35, and in which he replied that there were eight buying indicators and eight selling indicators (A-517-8), or a total of

sixteen. Immediately following the reading, he was asked whether the answer of "eight" was true when he gave it and he said that it was and, he was then asked if it was true today (the day of the trial), and he said it was (A-519).

It must have been perfectly evident to the Court that deGive had in this last answer contradicted his previous claim of ten indicators on Ex. 35 (five to buy and five to sell), rather than sixteen indicators and suggested that the witness should explain his answer. There then followed a colloquy beginning on A-519 and continuing over to A-522 , in which Mr. deGive repeated, in effect, that both answers were true although they did not agree with each other.

Mr. deGive was given one more chance to recapitulate the number of indicators, to which he replied "Your Honor, I would like to have the charts back again. I cannot remember the totals that easily" (A-524). Judge Pierce then indicated that he would take notes on the number of indicators to be read from each chart (A-524), but then refused to permit the answers to be given. As a result, the Court missed the serious contradiction which, in itself, proves that there was no system which could be in good faith applied by deGive (A-524-6).

The Second Proof That No System Existed

More surprising than deGive's inability to state the number of indicators to which he was looking for signals, is his

sworn admission that he did not follow the system when deciding whether to buy or sell from plaintiff's account. At A-528-30 the following appears in response to a question as to how many indicators had to agree with each other to signal a buy or sell:

"Q: What is the statistic of indicators that have to confirm each other on these charts that would have to be present as an indicator to buy?

A: The normal, the same"

"Q: 60 per cent?

A: Yes."

"Q: And if you saw 50 per cent would you buy?

A: Yes. I would buy on 50 per cent of the indicators signalling a buy . . ."

"Q: Did you give those answers to those questions?

A: I did."

"Q: Were they true when you gave them?

A: They were."

"Q: Are they true today?

A: Yes."

"Q: Mr. deGive, what is the percentage of indicators that you would move on in 1969 in applying the system to my client's account with respect to a sale?

* * *

A: I would move on the sale signal with the same conclusions that I had made on the buy signal.

* * *

A: I would have moved on 50 per cent or more, but I did not." (Underscoring Added)

* * *

"THE WITNESS: Your Honor, I said I would have moved - - may I rephrase that: I would have moved on a minimum of 50 per cent but, I did not move on the minimum of 50 per cent during that period; it was more." (A-531) (Underscoring Added)

This last answer with the rephrase is an open admission by deGive that although there was a time when he would move on 50 per cent concurrence in the signals, there were times, particularly the period at issue, when he did not follow that system. It is self-evident that a system by definition is one that is uniformly applied and, indeed, that was the defense to the charge that the system was merely an umbrella against the churning claim. In this colloquy, the witness admitted the truth of plaintiff's position.

The Third Proof that No System Existed

The fact that deGive did not use a "system" during 1969 which was the same as the system followed in previous years, also emerges from a comparison of two exhibits in evidence which detail the pattern of purchases by deGive in plaintiff's account during 1967, 1968 and 1969: (Transactions are grouped where they occur within seven days of each other, as deGive's charts were updated and his comments published weekly.)

<u>1967*</u>	<u>Stocks Purchased</u>	<u>1968*</u>	<u>Stocks Purchased</u>	<u>1969**</u>	<u>Stocks Purchased</u>
1/5	3	1/26-30	3	2/11-14	27
1/13	5	2/28	1	4/30-5/5	40
1/23	1	3/5-7	2	5/15	2
2/3	1	4/8-11	35	10/14-15	48
3/8	1	4/15	4	10/28-29	10
5/1-8	7	4/23	4	12/29	5
5/25	1	5/28	1		
6/13-19	5	6/4	2		
6/22-23	2	7/11	1		
8/4	1	7/26	1		
8/30	2	10/18	1		
9/12	1	11/13	6		
10/12	6	12/5	2		
11/24-28	9	12/20	6		
12/14	2				

* taken from D. Ex. 98(a) (A-970-76)

** taken from P. Ex. 2 (A-842-47)

As this chart graphically demonstrates, during 1967 and 1968 deGive invested continuously, week after week, a few stocks at a time. He made only one "major move", although he swore he was receiving continual "buy signals" from his alleged system. By comparison, in 1969, when he saw the same "buy signals" from his alleged system, he made only "major moves". Here again the trial court may not have analyzed this evidence because the obvious change in deGive's trading pattern went by without comment from the Court. Instead, the Court came to an erroneous conclusion that deGive operated the system in a uniform manner from year to year, thereby proving his good faith to the Court's satisfaction. The actual fact is the opposite. He did not operate the system in 1969 the way he had in prior years. Rather, he used the defense that a system was in operation only as an umbrella against a churning claim.

The Fourth Proof that No System Existed

deGive admitted that during the years 1969 and 1970, he did not have a trading account to which he applied his own system.

"Q. How about 1969 and 1970? Did you have an account and were you applying this system for your benefit then, let us say from February 11, 1969, to March 3, 1970?

A. I did not have an account." (Trial Tr., pp. 403,404)

It is inconceivable that if he in good faith believed that he had a system which with reasonable certainty would forecast the market trends, he would not use it for his own benefit. The absence of his own account is telling proof that deGive had no system.

B. The Court erroneously found that proof of deGive's good faith is shown by the fact that he consistently followed his own public market letters.

Another defense offered by deGive as proof of his good faith in managing plaintiff's account, is the claim that he acted in the same manner in buying and selling for her account as he publicly recommended and published in his weekly market letter. The Court accepted this explanation with the following findings:

"The evidence in the case supports the conclusion that the 'moves' made by deGive in the plaintiff's accounts correspond with the recommendations made in his market letter, which was circulated to several hundred subscribers, . . ." (A-780).

* * *

". . . the Court finds that deGive had a strong good faith belief in the efficacy of his technical material. This finding is supported by the fact that the same recommendations were made to several hundred persons. . ." (A-781)

* * *

"As the Court has noted above, each of deGive's moves in the plaintiff's accounts was made in accordance with his market letter, and thus based upon his indicators." (A-802)

The record directly contradicts the Court's findings as may be seen from the following comparison of moves in plaintiff's account with the published advice: On May 26, 1969, plaintiff's account was fully invested in stocks, all of which had been bought between April 30 and May 15, 1969.

On May 26, deGive wrote the following in his market letter which was published and sent to defendants' customers:

"The various technical indicators are now signalling caution. Investors should now adopt a policy of eliminating weak holdings."
(A-851)

On the next day, deGive sold all of the shares held in plaintiff's account. He obviously was not "eliminating weak holdings", nor was he reacting to a signal of "caution", unless we are to assume that all of plaintiff's holdings, which were bought within the past two or three weeks, were weak and had to be dumped. It is this type of irresponsible trading which was so costly to plaintiff and so remunerative to defendants, that is the basis of plaintiff case. Plaintiff urges that deGive's actions were calculated and not mere errors.

Again on November 10, 1969, deGive wrote the following in his market letter:

"The market is now nearing the end of a six week up cycle and will become increasingly selective. Accordingly, new buying should be deferred for the present." (A-1018)

Despite the fact that the market letter did not advise sales, deGive proceeded to sell \$81,000 worth of shares out of plaintiff's account on the very next day.

To be fair, deGive did give an excuse at the trial as to why he made those sales although his market letter did not advise that action. He said that he had decided to take some profits (which

in fact amounted to \$11,555) in order to off-set the losses taken earlier that year which amounted to \$120,000. (A-545-48,553). When asked why in that case he did not sell more stocks to off-set more of the losses, he replied: "In analyzing the material at that time, I expected the market eventually to go higher." (A-554-5). He also said: "In analyzing the basic technical material, I did not have a long term sell signal at that time. . .". (A-554), and he had previously said as another reason for not selling all of plaintiff's stocks on November 11: "In my analysis of the technical material, it was my judgment, at that time, that the up trend was still intact." (A-549)

The obvious conflicts in defendants' answers add up to these conclusions: Firstly, deGive's sales on November 11, did not come from the signals given off by his system; secondly, he made the sales even though he expected the market to continue to go up, and therefore, his actions were contrary to his own market signals and system; thirdly, he deviated from his practice of "major moves", selling only a small portion of plaintiff's holdings. The final conclusion is that deGive was wholly inconsistent in his actions, thus supporting plaintiff's claim that his "system" was a sham and that he acted for his own benefit, rather than for plaintiff's.

C. The Trial Court erroneously found that deGive made parallel purchases and sales in his wife's and Van Alen's accounts during 1969 and 1970.

To show his good faith, defendant put forward his wife's trading account, claiming that the trading in that account paralleled the trading in plaintiff's account. If this was uniformly true, it might be evidence of good faith, but if there is a variation at a critical juncture, the opposite conclusion must be drawn. The Trial Court, lacking an adequate analysis of the record, adopted deGive's argument in the following language:

"The evidence in the case supports the conclusion that the 'moves' made by deGive in the plaintiff's account corresponded with . . . 'the moves' deGive made in trading for his wife's account". (A-780)

* * *

". . .the Court finds that deGive had a strong good faith belief in the efficacy of his technical material. This finding is supported by the fact. . . deGive made parallel moves in his wife's account when he moved in plaintiff's account." (A-781)

* * *

"There is no dispute that his decisions in plaintiff's accounts reflected similar decisions made for his spouse." (A-804)

The following evidence proves beyond peradventure that the Trial Court was mistaken in its findings:

On November 11, 1969, deGive began to sell securities in his wife's account. This selling pattern continued until December 10, 1969, by which time he had sold it all (A-558). Whereas deGive sold only an insignificant five stocks from plaintiff's account in this time period, while continuing to retain fifty-two other stocks in plaintiff's account for an additional sixty days.

In late December, 1969, deGive again reinvested his wife's account, but on January 9th to 12th, 1970, he sold out the account completely (A-660). By contrast, deGive did not make any sales for plaintiff until three weeks later, and only after he received a call from her on January 29, 1970.

This discrepancy is important because the record shows that deGive deviated on two occasions within thirty days of each other, in the handling of his wife's account and plaintiff's account. On these two occasions, presumably acting on "sell signals", he sold out his wife's account completely, but made few, if any, sales in plaintiff's account. Also, as may be seen from plaintiff's Ex. 20 (A-891a), plaintiff's biggest losses occurred at just this time. These discrepancies, which apparently were overlooked by the Court, show that deGive's claim to have operated the two accounts in a uniform way was false at the critical juncture.

D. The Trial Court resolved in defendants' favor all key issues of credibility between plaintiff and deGive, despite deGive's repeated retractions, reversals and contradictions of his prior statements made at depositions and of his own testimony at trial.

The Trial Court in its opinion found conflicting testimony between plaintiff and deGive as to the existence and non-existence of certain conversations and as to the content of certain conversations between plaintiff and deGive. As to these conversations, some of which relate to the ultimate issues in this case, Judge Pierce chose to believe deGive over plaintiff. Plaintiff concedes that as trier of fact, Judge Pierce had much latitude in deciding whom to believe. However, it is indisputable that a trier of facts must be reasonable in deciding whom to believe. Plaintiff respectfully submits that because deGive repeatedly changed his testimony, retracted testimony given at deposition, and contradicted his own testimony at trial, he was not worthy of belief.

1. At trial, deGive continually described plaintiff as an investor. He did not want to characterize her as either a long term investor or an intermediate investor, but merely suggested that if the "signals" were appropriate, she would become a long term investor (A-420). However, in the examination before trial, deGive stated:

"Q: So when you took an action for Mrs. Van Alen in 1969, it was on the basis of cycles that would apply to long term investors, rather than cycles that would apply to the trader?

A: Yes." (A-422)

2. When asked to describe the difference between an "agile trader" and a "trader", deGive replied at the trial that the "point of time", i.e., the time the trades were made, distinguishes an agile

trader from a trader (A-427). Whereas, at the examination before trial, deGive testified that there was no difference between a trader and an agile trader (A-428).

3. At the trial, deGive stated that he did not at any time from 1953 through 1970 consider plaintiff an agile trader (A-428). However, at his examination before trial, deGive gave the opposite response (A-429).

4. When asked at trial if at any time in 1968 he considered plaintiff as an intermediate trader, deGive stated that he did not. However, he stated the opposite to be true before trial (A-429,30). When questioned about the inconsistency, deGive surprisingly stated at the trial that his answers were true when they were given at the deposition, but they were not true at the time of trial (A-430-1).

5. According to deGive's trial testimony, a short term trader does not need the 7, 10, 12 and 30 day cycles to confirm for a buy signal. However, before trial, he stated that the 7, 10, 12 and 30 day cycles all had to confirm for a buy signal (A-431-2).

6. At deposition, deGive was very indefinite as to the relationship between the 7 day indicator and an "intermediate over sold condition". At trial, deGive had become more definite, stating that the 7 day indicator is also used to determine an "intermediate over sold condition". deGive did not mention the 7 day indicator when testifying about an "intermediate over sold condition" at his deposition. (A-392-97)

7. deGive testified before trial (A-528) that he

only needed 50% of his signals to confirm a buy or sell signal. At trial, deGive stated that with respect to the period beginning 1969, 100% of the signals in plaintiff's account had to confirm a buy or sell (A-531).

The comment which should have put the Court on guard with respect to deGive's credibility appears in the record at Tr. 660. When pressed for a percentage required to indicate a sell signal, deGive asked that the previous question with respect to the buy signal be repeated for the following reason:

"That is the reason I asked the question on the buys before. I want to remember the percentage I said." (A-530)

If deGive had been giving honest answers with respect to a system which he really operated for many years, he surely would not have required that answer to be repeated.

E. Other Erroneous Findings of Fact

1. The Court found that plaintiff "never complained about the short term trading in 1968 which resulted in substantial profits". (A-798) The obvious implication of the Court's finding is that plaintiff brought this lawsuit with respect to 1969 sales only because she suffered losses. However, the exhibits in the record show that in 1968 deGive lost more than \$180,000 in trading plaintiff's account. (A-785,983,992). If the Court had known the true facts, it should have drawn the conclusion that plaintiff suffered her losses silently as long as deGive's pattern of trading remained unchanged, but complained when she saw "major moves" time after time, which certainly looked like classic churning.

2. The Court found evidence of "considerable correspondence" between plaintiff and deGive indicating her awareness of activity in her account. (A-783) This correspondence consisted of about ten letters spread over the twenty year history of plaintiff's account with deGive. One letter on an average of every two years cannot be considered by reasonable men to be evidence of considerable correspondence.

3. The Court made conflicting findings of fact on the question of the knowledge of the Dominick officers regarding deGive's continual and patent violations of the Stock Exchange rules. In one part of the opinion, the Court noted that contrary to the rules, none of the trades made for plaintiff's account were initialed or approved in advance by an officer of Dominick (A-786), and that deGive handled plaintiff's account without any significant intervention or supervision by members of the firm. (A-785) In addition, the record contained these admissions of the officer of Dominick who was responsible for supervising deGive's accounts:

(i) He knew that deGive had about twenty-five accounts, most of which were discretionary. (A-747-763)

(ii) He was aware of the rule requiring approval of orders in discretionary accounts. (A-750)

(iii) He never did anything to learn any facts relative to plaintiff's account. (A-745,47)

(iv) There was no method in effect during 1969 to identify discretionary accounts. (A-745-6)

(v) He could not have detected the pattern of trading in plaintiff's account. (A-749,50) Also, the record contained

the admission of Dominick that no orders entered by deGive in plaintiff's account were identified as discretionary, or initialed or approved, as required by the rules. (A-733)

In the face of all of this evidence and his own findings, the Court was apparently impressed by the testimony of the President of Dominick, who bore the proud name of Rockefeller, and who swore that he thought the firm was following the rules in handling plaintiff's account. As a result of this unsupported statement by Mr. Rockefeller, the Court concluded that the firm was operating within the guidelines of the Stock Exchange rules (A-786,7), a conclusion directly contradicted by the overwhelming facts in the record. It is submitted that reasonable men should not be overwhelmed by a statement from a person bearing a distinguished name, when his statement is so obviously contradicted by what actually happened as compared to what the distinguished person wished had happened. In this case the officer in charge of deGive was not supervising deGive and admitted it openly, which can only lead to the conclusion that intelligent people at Dominick knew what the figure-head did not know, i.e., the firm was not complying with the rules in this case.

4. deGive admitted that as soon as he opened plaintiff's discretionary account, he violated a fundamental rule in failing to show the nature of the account on the "account card". (A-337,341) Thus, although he was responsible for preparation and updating of the card and although he did update it from time to time, the card never showed that plaintiff had a discretionary account. (A-340-45)

The Court never alluded to this fact in its opinion, but came to the conclusion that defendants intended to comply with the rules.

5. As noted above, the record shows that deGive had about twenty-five discretionary accounts. The Court also found that deGive's commission from plaintiff's account alone was between 15% and 20% of his total commission earnings. (A-804) The logical conclusion would have to be that the income deGive earned from plaintiff's account was important to him and that he might in fact knowingly commit some fraud for that sum of money. The Court's conclusion, however, was that the defendants' income from plaintiff's account was too small to warrant the inference of scienter.

There are times where "justice delayed is justice denied" and there are also times where "haste makes waste". It is submitted that the Court's eagerness to dispose of this case caused it to fail to adequately analyze a long and complex record involving the subtle scheme of fraud which was hidden behind a paper facade of graphs and charts. Had the Court below been patient enough to wait for the transcript and to give counsel and itself a chance to compare the exhibits with the testimony and indeed to compare some parts of the testimony with other parts of it, we believe that the numerous erroneous findings may have been avoided and a different conclusion would surely have been reached. In any event, the overwhelming number of material erroneous findings of fact and conclusions drawn from them require a reversal of the hasty decision rendered in this case.

CONCLUSION

The decision of the Trial Court should be reversed.

Respectfully submitted,

Charles Norman Shaffer,
Shaffer and Davis
10 South Adams Street
Rockville, Maryland 20850

Of Counsel:

Jerome Kamerman
Philip A. Greenberg
David S. Zeidman

2 Copies Received
Date May 6, 1977
Firm White & Goose
By James O. Kelly/Kelch